Filed 2/16/05 Bray v. Airey CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LAURACK D. BRAY,

Plaintiff and Appellant,

v.

ANDREA AIREY, et al.,

Defendant and Respondent.

2d Civil No. B173538
(Super. Ct. No. CIV 218468)
(Ventura County)

Laurack D. Bray was awarded $1,575 damages for a leaky roof in a negligence action against his landlord, Hoi Nguyen, and the property manager, Andrea Airey. The trial court awarded no damages against Milt Airey, Andrea Airey's employer. Bray appeals from the judgment, contending among other things, that the trial court erred in not awarding punitive damages and attorney fees. We affirm

Facts and Procedural History.

In March 1999, appellant rented an apartment at 1019 East Santa Clara Street, Ventura, pursuant to a month to month lease. The triplex was owned by Hoi Nguyen and managed by Milt Airey and Andrea Airey. Appellant operated a law office out of the apartment.

Between 2001 and 2003, appellant's monthly electricity bill increased from $45 to $265 for no apparent reason. A serviceman for the Southern California Edison Company

determined that someone had cross-wired Unit B to appellant's electrical meter (Unit A) so that appellant was paying for electricity in both units. Appellant complained to respondents who promptly fixed the wiring problem.

Appellant also complained about a leaky roof and that another tenant was blocking his parking space. The apartment manager, Andrea Airey, hired a roofer to make repairs.

Appellant sued for negligence damages and waived jury trial.[1] The evidence showed that respondents quickly resolved the parking problem after appellant complained about it. Appellant was awarded no damages for interference with parking.

With respect to the electrical problem, the trial court found that a tenant "hot-wired the electrical junction box so as to route his electrical use through Mr. Bray's meter. That is a violation of Penal Code section 498, and it caused palpable economic loss to Mr. Bray." The trial court found that respondents did not create a dangerous or uninhabitable condition and had no prior knowledge of the electricity theft. When respondents were notified of the wiring problem, it was promptly fixed. Appellant was awarded no damages for excess electricity bills.

With respect to the roof leak, the trial court found that the owner (Nguyen) and property manager (Andrea Airey) were slow in fixing the problem. Because the leak affected the habitability of the premises, appellant was awarded $75 property damages and $1,500 noneconomic damages. The trial court found that "there is no testimony or evidence implicating defendant Milt Airey."

Excess Electricity Bills

Appellant argues that the trial court erred in finding that respondents were not liable for the electrical problem. "A tenant injured by a defect in the premises . . . may

---

[1] The third amended complaint sought damages for "deceit or negligence" with respect to the electrical problem, negligence for a "defective roof," and damages for "negligent supervision/management."

bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection." (Peterson v. Superior Court (1995) 10 Cal.4th 1185, 1206.)

It is uncontroverted that respondents had no prior knowledge that the electrical system was cross-wired. The tenant in Unit B was an electrician and cross-wired the meters to steal appellant's electricity. A Southern California Edison employee, Paul Godeck, testified that the electrical junction box was closed and that a lay person looking at the box could not tell if the meters were cross-connected.

The trial court correctly found that respondents had no duty to police the tenants or the electrical meters. A property owner or manager is not liable for the unforeseeable criminal conduct of a third party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1148-1150; 8 Miller & Starr, California Real Estate (3rd ed. 2001) Landowners' Liability, § 22:54, p. 259.) Because respondents had no knowledge that the meters were cross wired, appellant was not entitled to damages on the first cause of action. (*Sharon P. v. Armand, Ltd.* (1999) 21 Cal.4th 1181, 1190-1191; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 679-680.)

Parking

Appellant's assertion that he should have been awarded damages for interference with parking is equally without merit. Respondents did not learn about the problem until appellant complained. Andrea Airey told the tenant to cease and desist. Substantial evidence supported the finding respondents were diligent in correcting the problem and breached no duty of care.

Milton Airey

The trial court found that Milton Airey was not liable for the roof leak, but awarded $1,575 damages against Nguyen and Andrea Airey. Appellant maintains that Milton Airey is liable under the doctrine of respondeat superior because Andrea Airey

was his employee. The issue was waived. The notice of appeal states that appellant "does not appeal the trial court's finding and judgment of **liability** as to **Count II** of Plaintiff's Third Amended Complaint (i.e., negligence as to defective roof[.])"

Discovery and Notice of Lien

Appellant argues that the trial court erred in denying his motion to compel discovery.[2] Appellant, however, has not provided a reporter's transcript of the discovery hearing or a settled statement on appeal. We affirm on the ground that the order is presumed correct. (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521-522; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

Appellant's claim that the trial court erred in not striking a lien is equally without merit. Before trial, Nguyen obtained a $4,112.36 unlawful detainer judgment against appellant. Nguyen filed a notice of lien (Code Civ. Proc., § 708.410, subd. (a)) which appellant moved to strike. The motion was denied October 31, 2003.

Appellant has provided no transcript of the hearing or settled statement on appeal. We affirm on the ground that appellant has made no showing, on the face of the record, that the trial court abused its discretion. (*Wheelright v. County of Marin* (1970) 2 Cal.3d 448, 454.)

Punitive Damages

Appellant asserts that the trial court erred in not awarding punitive damages. No evidence, however, was received that respondents engaged in fraudulent, malicious, or oppressive conduct within the meaning of Civil Code section 3294, subdivision (a). Mere negligence, even gross negligence, is not sufficient to justify an award of punitive damages. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 828.)

---

[2] Nguyen objected to the discovery on the ground it was untimely and served after the initial trial date. (Code Civ. Proc., § 2024, subd. (a).)

Attorney's Fees

Appellant finally contends that the trial court erred in not awarding attorney's fees under the terms of the lease. We reject the argument because the action is for negligence. Civil Code section 1717 does not permit the recovery of attorney fees for tort claims arising out of or related to a contract. *(Moallem v. Coldwell Banker Com. Group* (1994) 25 Cal.App.4th 1827, 1830.) "It also is well settled that '. . . an action for fraud seeking damages sounds in tort, and is not "on a contract" for purposes of an attorney fee award, even though the underlying transaction in which the fraud occurred involved a contract containing an attorney fee clause.' [Citations.]" (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 430.)

Appellant's remaining arguments have been considered and merit no further discussion.

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

Laurack D. Bray, in pro per, Appellant.

William P. Pangburn, for Milton and Andrea Airey, Respondents.

William G. Schneberg, for Hoi T. Nguyen, Respondent.